

# STATE OF INDIANA



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## FILED

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INDIANA UTILITY  
REGULATORY COMMISSION

CAUSE NO. 42755

IN THE MATTER OF THE COMPLAINT BY UNITED )  
TELEPHONE COMPANY OF INDIANA, INC. D/B/A )  
SPRINT AGAINST KANKAKEE VALLEY RURAL )  
ELECTRIC MEMBERSHIP CORPORATION )  
CONCERNING THE FAILURE AND REFUSAL OF )  
KANKAKEE VALLEY RURAL ELECTRIC )  
MEMBERSHIP CORPORATION TO NEGOTIATE )  
REASONABLE COMPENSATION PERMITTING )  
SPRINT TO USE POLES AND OTHER EQUIPMENT )  
OWNED BY KANKAKEE LOCATED ON, OVER, OR )  
UNDER VARIOUS STREETS AND HIGHWAYS )  
)  
RESPONDENT: KANKAKEE VALLEY RURAL )  
ELECTRIC MEMBERSHIP CORPORATION )

You are hereby notified that on this date the Presiding Officer in this Cause makes the following Entry:

On January 14, 2005, respondent Kankakee Valley Rural Electric Membership Corporation ("KV REMC") filed with the Indiana Utility Regulatory Commission ("Commission") its *Motion to Dismiss* ("Motion") this Complaint proceeding. On February 3, 2005, complainant United Telephone Company of Indiana, Inc. d/b/a Sprint ("Sprint") and intervenor Indiana Bell Telephone Company, Incorporated ("SBC Indiana") filed responses in opposition to the Motion. On February 15, 2005, KV REMC filed a reply to the responses.

Sprint's Complaint asserts the applicability of I.C. 8-1-2-5 ("Pole Attachment Statute") to this proceeding. I.C. 8-1-2-5, in part, states:

(a) Every public utility, and every municipality, and every person, association, limited liability company, or corporation having tracks, conduits, subways, poles, or other equipment on, over, or under any street or highway shall for a reasonable compensation, permit the use of the same by any other public utility or by a municipality owning or operating a utility, whenever public convenience and necessity require such use, and such use will not result in irreparable injury to the owner or other users of such equipment, nor in any substantial detriment to the service to be rendered by such owners or other users. . . .

(b) In case of failure to agree upon such use or the conditions or compensations for such use, or in case of failure to agree upon such physical connection or connections, or the terms and conditions upon which the same shall be made, any public utility or any person, association, limited liability company, or corporation interested may apply to the commission and if after investigation the commission shall ascertain that public convenience and necessity require such use or such physical connections, and that such use or such physical connection or connections would not result in irreparable injury to the owner or other users of such equipment or the facilities of such public utilities, nor in any substantial detriment to the service to be rendered by such owner or other public utilities or other users of such equipment or facilities, it shall by order direct that such use be permitted and prescribe reasonable conditions and compensations for such joint use and that such physical connection or connections be made and determine how and within what time such connection or connections shall be made, and by whom the expense of making and maintaining such connection or connections shall be paid.

Sprint's Complaint alleges that KV REMC owns various conduits, poles, and other equipment ("Poles") located on, over, or under different streets and highways in Indiana and that, while Sprint has been attaching its facilities to KV REMC's Poles pursuant to an agreement, KV REMC is now demanding that Sprint enter into a new agreement, with higher rates, in order for Sprint to continue using KV REMC's Poles. Pursuant to the Pole Attachment Statute, Sprint is asking the Commission to determine reasonable compensation under which it can continue to utilize KV REMC's Poles.

The Motion argues that, insofar as KV REMC has withdrawn from Commission jurisdiction pursuant to I.C. 8-1-13-18.5 ("Opt-Out Statute"), the Commission lacks jurisdiction over Sprint's Complaint. This argument is based on section 18.5(i) of the Opt-Out Statute, which limits Commission authority over a REMC that has withdrawn from Commission jurisdiction:

If a corporation [REMC] withdraws from the jurisdiction of the commission, the commission shall continue to exercise jurisdiction over the corporation only as to the following:

- (1) Electric service area assignments under IC 8-1-2.3.
- (2) Certificates of public convenience and necessity, certificates of territorial authority, and indeterminate permits under IC 8-1-2, IC 8-1-8.5, or IC 8-1-8.7.
- (3) Water utility disputes under IC 8-1-2-86.5.

Since Sprint's Complaint concerns none of the matters addressed in this statute limiting Commission authority over a REMC that has withdrawn from Commission jurisdiction, it is KV REMC's contention that the Commission lacks the statutory jurisdiction necessary to regulate this REMC under the Pole Attachment Statute.

KV REMC also states that, even had it not withdrawn from Commission jurisdiction in 1998, Commission authority over KV REMC would still be limited to that jurisdiction conferred by the Rural Electric Membership Corporation Act (I.C. 8-1-13-1 *et. seq*). KV REMC claims that, as a REMC, it is not a public utility subject generally to the provisions of the Public Service Commission Act (I.C. 8-1-2-1 *et. seq*), and that it is specifically not subject to Commission regulation under the Pole Attachment Statute.

KV REMC notes that the Pole Attachment Statute was last amended in 1993, whereas the Opt-Out Statute was enacted more recently in 1995. KV REMC claims that if the Indiana Legislature had intended for the Commission to retain jurisdiction over a REMC's Pole attachments (if it had such jurisdiction) the Legislature would have so stated when it enacted the Opt-Out statute. As a matter of statutory construction, KV REMC argues that the Opt-Out Statute is the more recent and specific legislative pronouncement and, therefore, must prevail over the Pole Attachment Statute.

In its response, Sprint asserts that the language of the Pole Attachment Statute confers Commission jurisdiction over not only every public utility and municipality, but also over every person, association, limited liability company, or corporation. According to Sprint, the obligation imposed by the Pole Attachment Statute, that all Pole owners allow Pole attachments for reasonable compensation, is not dependent upon the Pole owner's status as a public utility or if the Pole owner is otherwise subject to Commission jurisdiction. Sprint argues that the Pole Attachment Statute and the Opt-Out Statute are compatible insofar as the limitation of jurisdiction provision of the Opt-Out Statute addresses matters applicable solely to public utilities while the Pole Attachment Statute has applicability regardless of whether the Pole owner is a public utility. Thus, according to Sprint, there would be no legislative reason to designate the Pole Attachment Statute as an exception to the Opt-Out Statute.

While SBC Indiana's response to the Motion presents some of the same arguments as found in Sprint's response, SBC Indiana also asserts that the Complaint filed in this proceeding is an outgrowth of a complaint brought by KV REMC in Porter County, Indiana, in the Porter Superior Court against Sprint, SBC Indiana, and Verizon. SBC Indiana states that the Porter Superior Court granted the defendants' motion to dismiss or stay KV REMC's complaint on the grounds that the Commission has exclusive jurisdiction to resolve the Pole attachment disputes set forth in KV REMC's complaint. In addition, according to SBC Indiana, KV REMC's request for an interlocutory appeal was denied by the Court of Appeals, thus binding KV REMC to the Porter Superior Court's order which referred the issue concerning Pole attachments to the Commission. While the exact nature of KV REMC's complaint in Porter Superior Court against these telephone company defendants is not presented, SBC Indiana argues that application of the legal doctrines of "res judicata," "collateral estoppel," and "law of the case" to the ruling of the Porter Superior Court, prevents KV REMC from relitigating the issue of Commission jurisdiction in this proceeding.

KV REMC disputes this argument by asserting that, despite the Porter Circuit [Superior] Court's referral of this matter, the Commission must make an independent determination of jurisdiction. KV REMC claims that determining jurisdiction is an essential function of the

Commission and a court may not usurp that function. In addition, KV REMC claims that the Court's decision is not a final judgment; that the judicial proceeding has been stayed and is subject to further adjudication, pending a resolution by the Commission.

The Pole Attachment Statute begins by stating that the obligation to allow public and municipal utilities to use Poles applies to "Every public utility, and every municipality, and every person, association, limited liability company, or corporation having . . . poles . . . on, over, or under any street or highway." By requiring such a comprehensive list of Pole owners to allow public and municipal utilities to use their Poles, the Pole Attachment Statute presents a clear legislative purpose to reasonably limit the number of Poles used for utility purposes by requiring efficient use of existing Poles. Poles are often considered unsightly and their frequent proximity to roadways can result in property damage and/or personal injury when a vehicle leaves the roadway and strikes a Pole. As pointed out by Sprint, it is reasonable to conclude that it furthers the public convenience and necessity to make efficient use of existing Poles, and to discourage the construction of duplicate Poles, not only for aesthetic and public safety reasons but also for the economic reason of reducing the cost to provide utility service to the public. This legislative purpose to further the public convenience and necessity is balanced with the requirements that a Pole owner be reasonably compensated for such use and that such use not result in irreparable injury to, or substantial detriment to the service provided by, the Pole owner or other users.

It is a reasonable conclusion that, even as a REMC that has withdrawn from Commission jurisdiction, KV REMC can still be classified as one or more of the entities listed in the Pole Attachment Statute. In fact, KV REMC does not argue that its status as an entity does not equate with any of the listed entities to which the Pole Attachment Statute applies. Rather, KV REMC argues that it is not subject to the Pole Attachment Statute because, having withdrawn from Commission authority pursuant to the Opt-Out Statute, Commission jurisdiction is limited only to service area assignments, certain certificates and permits, and water utility disputes. The justification offered for this argument is that by specifically limiting Commission jurisdiction in the Opt-Out Statute, the Indiana Legislature has clearly expressed the level of jurisdiction it intends the Commission to have over REMCs that exercise this provision. The issue, then, is one of determining whether the effect of the Opt-Out Statute with its jurisdiction-limiting provision is to deny the Commission authority to resolve disagreements involving KV REMC that arise under the Pole Attachment Statute, or whether the language and public interest purposes of the Pole Attachment Statute require that Commission jurisdiction be applicable to KV REMC.

Both sides argue their positions by application of statutory construction principles. If the plain language of a statute is clear, there is no reason to apply construction principles. *Sholes v. Sholes*, 760 N.E.2d 156, 159 (Ind. 2001). If, however, two statutes are actually or apparently contradictory, an attempt should be made to construe them in harmony, as Sprint suggests. *Neal v. DeKalb Cty. Div. of Fam. & Children*, 796 N.E.2d 280, 284 (Ind. 2003). Only when two statutes are irreconcilably in conflict is an attempt made to interpret legislative intent to be that one statute should prevail over the other. *Id.* Other than this latter statutory construction argument presented by KV REMC, that the Opt-Out Statute specifically lists those matters over which the Commission retains jurisdiction with respect to a REMC that withdraws from Commission jurisdiction, there is no obvious reason as to why a REMC should not remain

subject to the Commission's regulatory authority under the Pole Attachment Statute. Given the broad classification of pole owners subject to the Pole Attachment Statute, and the public interest concerns that this statute addresses, it is difficult to conclude that a REMC, particularly as one of the more likely entities to own Poles, and regardless of whether it has withdrawn from Commission jurisdiction, would not be subject to the same Pole regulation as all other Pole owners.

Therefore, to the extent any statutory construction is necessary, Sprint's assertion that the Pole Attachment Statute and the Opt-Out Statute can be harmonized by applying the Pole Attachment Statute to REMCs is more reasonable than KV REMC's suggested statutory construction that the more recent and specific Opt-Out Statute must prevail over the Pole Attachment Statute. Regardless of the limited utility regulation that still applies to a REMC following withdrawal from Commission jurisdiction, the REMC remains one or more of the following: a public utility, person, association, or corporation as provided in the Pole Attachment Statute and, therefore, is subject to the regulatory provisions of this statute.

In addition, in its argument that the Opt-Out Statute should prevail because it is more recent than the Pole Attachment Statute, KV REMC points out that the Pole Attachment Statute was last amended in 1993. It is worth noting that the subject of the 1993 amendment was to add "limited liability company" to the already broad list of entities that must allow public and municipal utilities to use their Poles. Therefore, the Legislature found it necessary to extend the applicability of this statute beyond its already broad applicability. This 1993 amendment makes it even more difficult to conclude that the 1995 enactment of the Opt-Out Statute intended to exclude REMCs from what is otherwise required of every public utility, municipality, person, association, limited liability company, or corporation.

The broad applicability of the Pole Attachment Statute is clear, as is the jurisdiction of the Commission to resolve disagreements arising under this statute, including disagreements involving KV REMC. It is also clear that the purpose of this statute can be accomplished without any involvement by the Commission. As long as certain conditions are met, Pole owners are required to allow public and municipal utilities to use their Poles. Only when there is a failure to agree on the conditions or compensation for such access does the Commission have jurisdiction to act. Such is the case in this proceeding.

The limited areas in which the Commission retains jurisdiction under the Opt-Out statute are areas in which the Commission already had, and will continue to have, authority over REMCs as related to their provisioning of utility service. When defining the limits of continuing Commission jurisdiction over REMCs that withdraw from Commission jurisdiction, there is no reason for the Opt-Out statute to specifically include the applicability of a statute that applies broadly to individuals and entities that have Poles, and applies to many such individuals and entities regardless of whether the Commission otherwise has jurisdiction over the Pole owners.

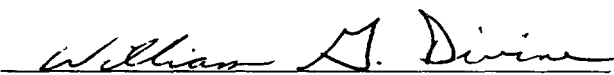
The above analysis and determination with respect to the Opt-Out Statute have the same applicability to KV REMC's other argument that even had it not withdrawn from Commission


jurisdiction, Commission jurisdiction would still not extend beyond the confines of the Rural Electric Membership Corporation Act.

Having determined that the Commission's regulatory authority under the Pole Attachment Statute includes authority to regulate KV REMC, it is not necessary to rule on Sprint and SBC Indiana's res judicata argument vis-à-vis related proceedings in the Porter Superior Court.

Accordingly, KV REMC's *Motion to Dismiss* is denied.

**IT IS SO ORDERED.**

  
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William G. Divine, Administrative Law Judge

  
\_\_\_\_\_  
Date